SASKATCHEWAN

FOIP FOLIO

April 2008

TOO MANY COOKS MAY SPOIL THE BROTH

On March 31, 2008, **Gary Dickson**, Saskatchewan Information and Privacy Commissioner, released his Report H-2008-001[1]. This detailed his review of the actions of the Saskatoon Regional Health Authority (the Region) in responding to access requests from a patient who sought access to his own personal health information and personal information.

The Commissioner found that the Region ultimately provided the Applicant with the records within its custody or control. The Commissioner was however critical of a number of actions on the part of the Region in the handling of the requests for access. These included too many different offices/roles involved in dealing with access requests and doing so in inconsistent ways. The Commissioner commended the Region for changes it has made to reduce the likelihood that similar problems will occur in the future. He also recommended that the Region clarify the role of the Client Services Representative so that the process for any patient to exercise their access rights proceeds smoothly and without undue delay. The role of the Privacy Officer in responding to access requests from patients is fundamentally different than the role of the Client Services Representative or Quality of Care Coordinator. It is important that all health regions recognize that difference and plan their access and correction processes accordingly.

The Report is accessible at www.oipc.sk.ca under the *Reports* tab.

TOUR OF CYPRESS HEALTH REGION

Portfolio Officers, **Angela Markel** and **Cam Moore** and the Commissioner toured the Cypress Health Region (CHR) from April 8 to 11, 2008. The very productive tour was organized and hosted by **Beth Adashynski** (Executive Director of Quality & Privacy) and **Mary Ann Woods** (Regional Health Information Manager) of the CHR. Both of these women have achieved a great deal in staff training and developing *The Health Information Protection Act* (HIPA) policies and procedures.

[1] Saskatchewan OIPC Report H-2008-001 online at http://www.oipc.sk.ca/Reports/H-2008-001.pdf

TOUR OF CYPRESS HEALTH REGION (CONT'D)

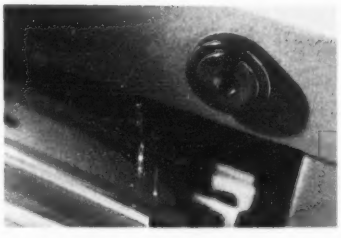
Our crew from the Office of the Information and Privacy Commissioner (OIPC) met with approximately 200 people over the course of the four day tour, including nine formal presentations, numerous informal meetings, and a session with local media on the first day of the tour. In addition to visiting several facilities including the Gull Lake Special Care Centre and speaking with various staff of the CHR, the OIPC also presented to staff of the Foyer St. Joseph (Ponteix), physicians of the Regional Medical Association, the RHA Board and physicians and staff of a local medical clinic. We participated in a very productive meeting with the RCMP, firefighters and Emergency Medical Services to discuss their role in dealing with personal health information. We also had the chance to discuss privacy and health care with the local Lions Club at its regular evening meeting. All of us at the OIPC congratulate Beth, Mary Ann and their colleagues for what they have been able to achieve in CHR.

MARK YOUR CALENDAR – UPCOMING PRAIRIE HEALTH INFORMATION CONFERENCE

Though still in the preliminary planning stages, you will want to mark Wednesday, October 22, 2008 in your calendars. In April 2007, we co-hosted the first ever Prairie Health Information Privacy Day in Regina along with the Manitoba Ombudsman and the Information and Privacy Commissioner for Alberta. This year, the conference venue has moved east to Winnipeg, Manitoba. Drawing on real case examples from all three Prairie Provinces, many years of experience in the health information privacy arena, and practical advice from experts in the field, this event will provide delegates with a clear and working understanding of health information privacy issues specific to Canada's Prairies.

Though still in development, the website for this event is up and running: http://verney.ca/phipd2008/. As we confirm more details, we will provide updates in future issues.

NEW REGULATIONS UNDER THE SECURITIES ACT, 1988



Privacy protection in Saskatchewan will be enhanced by the provisions in *The Securities Commission (Disclosure of Personal Information) Regulations, 2008*. Before an organization can obtain personal information under subsection 152.1(4) of *The Securities Act, 1988*, there must be a written agreement to protect the personal information and limits on the use and disclosure of that personal information.

RIGHT TO KNOW WEEK

In 2008, the week of September 28-October 3 will be Right to Know Week. The Right to Know Steering Committee is already hard at work lining up speakers for what promises to be another interesting program with sessions in both Regina and Saskatoon.

NOMINATIONS FOR CULLITON AWARD

This year, the steering committee is again seeking nominations for the *Chief Justice E.M. Culliton Right to Know Award.* Last year, the Saskatchewan Health Quality Council received the award.

The intent of the award is to celebrate and to recognize leadership in promoting open and accountable government. To be eligible, the body must be a Saskatchewan government institution (provincial government department, Crown Corporation, board, commission or agency) or a local authority (regional health authority, municipality, library, school, university or college). The nominee should be an agency that has demonstrated some or all of the following qualities:

- Leadership in promoting public access to the agency's information;
- Creativity in building public awareness of access to information;
- Excellence in orientation of, and service training in, employee access to information responsibilities; and/or
- Innovation in the development of tools to promote or facilitate access to information.

The deadline for nominations is **September 15, 2008**. Nominations can be self-initiated or third party. The nomination should include:

- a letter of nomination (up to 1,000 words), and
- samples of materials relevant to the nomination (testimonials or other material).

The Award will be presented during Right to Know Week. Nominations should be sent to the Right to Know Steering Committee, c/o #503, 1801 Hamilton Street, Regina, SK S4P 4B4 or fax: (306) 798-1603 or email: kphilip@oipc.sk.ca.

RTK ESSAY CONTESTS

Also again this year, the Right to Know Steering Committee is announcing two essay contests on the topic: *"Why the right of access to information is important in a modern democratic society."* One contest is at the high school level and offers a $300 scholarship. The other contest is at the university level and offers a $500 scholarship. Submissions are due **Monday, September 22, 2008**. Prizes will be awarded during this year's Right to Know Week, September 28th to October 3rd.

If you would like more information about Right to Know Week 2008 events, visit our website at www.oipc.sk.ca under the *Right to Know* tab or contact us at (306) 787-8350.

ROLE OF QUALITY OF CARE COORDINATORS

As a result of the Fyke Commission recommendations, the position of Quality of Care Coordinator was mandated for health regions. The difficulty is that while these positions are no doubt important, as is the work they do in their regions, this work should not be done at the expense of statutorily mandated requirements such as HIPA.

HIPA is a statute, not just a policy directive. What's more, it is a special kind of law, one that the Supreme Court of Canada describes as "quasi-constitutional" and one that is normally paramount to other provincial laws. Yet, it appears that in some regions we have the tail wagging the dog in the sense that HIPA compliance has been designed to accommodate the Quality of Care initiative instead of the other way around.

Every region has a Quality of Care Coordinator but in many regions, there is no Privacy Officer or HIPA Coordinator described as such. In those regions the Quality of Care Coordinator also acts as Privacy Officer. If one visits websites, it is easy to find who is the Quality of Care Coordinator but next to impossible to identify who might be the Privacy Officer responsible for HIPA compliance. In a number of regions brochures are readily available that describe in considerable detail the role of Quality of Care Coordinator but there is no corresponding brochure describing the role of the Privacy Officer. The brochures make no reference to HIPA, no reference to the ability to request that errors be corrected and no reference to the right to appeal to an independent Information and Privacy Commissioner office. Such a brochure likely fails to meet the transparency requirement in section 9 of HIPA.

This is significant since the roles of a Quality of Care Coordinator and that of Privacy Officer may have some things in common, such as a patient-centered focus, but also fundamental differences. As noted in our recent Report H-2008-001, the Quality of Care Coordinator has a general responsibility to improve communication with the patient/client, to mediate patient dissatisfaction and presumably to reduce the incidence of formal complaints, lawsuits, etc. against the regional health authority. On the other hand, when a patient/client wishes to access their own health record or to correct errors, they are entitled to do so readily and speedily. The region needs to have a simple, transparent process to accommodate the exercise by a patient/client of those HIPA rights. To exercise HIPA rights, the patient/client is not obligated to provide a reason or reasons for their action. They are not obligated to enter into discussions about their motivation or state of mind for choosing to exercise those HIPA rights. They are not required nor expected to go through a series of exchanges with assorted regional personnel before they communicate with the Privacy Officer or other individual who is competent and responsible to respond to their access request or correction request.

ROLE OF QUALITY OF CARE COORDINATORS (CONT'D)

It has always been highly recommended by this office that regions appoint a Privacy Officer without delay. The position of Privacy Officer has been widely adopted in other jurisdictions with a health information privacy law and certainly represents a 'best practice' for efficient and appropriate compliance with that law. When a regional health authority does create such a position, it is essential that this be communicated to both staff and the public by means of website, brochures, posters, etc. and reinforced in staff orientation and in-service training.

To the extent that the Quality of Care Coordinator is dealing with a patient/client, it is important that the moment it becomes clear that the individual wishes access or a correction of their personal health information or wishes to make a complaint of non-compliance with HIPA, the individual should either be referred to the Privacy Officer or the Quality of Care Coordinator needs to adopt a new role as agent for the Privacy Officer.

WHAT RECORDS ARE IN THE CUSTODY OR CONTROL OF A REGIONAL HEALTH AUTHORITY?

NOT SITE SPECIFIC

Regional Health Authorities (RHA) in Saskatchewan are in a curious position. Because they are simultaneously both a "trustee" under HIPA and a "local authority" under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), when they receive a request for access to information, the records that are responsive to that request may be in a number of different places and sometimes at a number of different sites within the region. In the OIPC's most recent review report, Report H-2008-001, the records that were responsive to the access request were found to be in a number of different locations in a number of different forms. Responsive records in this case included mental health assessments, security reports, handwritten observations scribbled in a security officer's notebook, thus engaging both HIPA and LA FOIP.

In our experience, it is common practice for patient information within a RHA to be kept in a number of different locations. It is also common that the written access requests under HIPA will be submitted not to the Privacy Officer/HIPA Coordinator but to someone at their local hospital or some other facility operated by the RHA. Some RHAs have created their own Access to Information Forms with the name of a particular hospital or facility on the header, and are of the belief that because of this, when an Access to Information request is made, the search need only be limited to that hospital or facility. Incidentally, this is yet another reason why it makes good sense to ensure that the role of Privacy Officer is clearly and transparently defined along with that person's contact information for the benefit of patients. To the extent that the patient has

WHAT RECORDS ARE IN THE CUSTODY OR CONTROL OF A REGIONAL HEALTH AUTHORITY? (CONT'D)

to guess who is responsible for HIPA access requests and correction requests there is a greater risk that the duty to assist the applicant will not be met.

When a Request for Access is received, the public body has a duty to search for, identify and consider **all responsive records in the custody of the trustee** not just responsive records that may be located in the facility that receives the access request. Most patients or clients will have very little knowledge about whether or when and how records about them move from one provider to another or from one facility to another. That lack of knowledge cannot be allowed to become a way for trustees to avoid their statutory obligation to respond openly, accurately and completely to an access request. Unless the applicant indicates otherwise, the access request should not be 'read down' to relate only to records of the particular hospital or institution that receives the access request. *The Freedom of Information and Protection of Privacy Act* (FOIP) and LA FOIP are clear that access rights relate to "*records that are in the possession or under the control*" of that body. In HIPA the test is whether the records are "*in the custody or under the control*" of a trustee.

MUST BE AN ADEQUATE SEARCH

You can consult, as a guide when considering where responsive records could be found, the OIPC's ***Helpful Tips*** guide[2]. It provides some questions that a FOIP or HIPA coordinator should ask themselves in responding to an access request. These include:

- *Were records in any form or format considered (i.e. electronic, paper, other)?*
- *Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?*
- *How did you search for records in the public body's possession?*
  - *Did you search yourself?*
  - *Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?*
  - *Did you send out an email to other units, etc?*
- *Could records also exist that are responsive to this access request that are not in your possession, but in your control?*
  - *Did agents, consultants or other contracted services have any role in the project the access request is referencing?*
  - *If yes, are these records included in the package provided to the OIPC?*

It is always best to consider these questions when first responding to an access request than having to answer them later in a formal review.

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[2] Office of the Saskatchewan Information and Privacy Commissioner *Helpful Tips* online at http://www.oipc.sk.ca

BRITISH COLUMBIA BILL TO ENABLE IMPLEMENTATION OF ELECTRONIC HEALTH RECORDS

The British Columbia Minister of Health, **George Abbott**, has introduced in the BC Legislative Assembly, Bill 24 *E-Health (Personal Health Information Access and Protection of Privacy) Act*. Up to this point, health information in that province has been dealt with very differently than the other 3 western provinces. Health regulatory bodies are subject to FOIP, health regions and personal health information they control or have in their custody are subject to FOIP and there has been a requirement that health organizations develop and implement codes of practice to manage privacy and confidentiality. That arrangement will continue.

Bill 24 provides for the creation of a data stewardship committee that is solely responsible for managing the disclosure from health information banks or ministry databases. A similar data stewardship committee has been operating in Alberta to oversee Alberta Netcare although that committee does not have the legislative authority of a custodian[3]. This would capture disclosure to health care providers of personal health information but also disclosure for research or planning purposes. Individuals have the right to ask an administrator for that individual's personal health information contained in the health information bank, a record of any disclosure directives made by the person and information respecting who has collected, used or disclosed that person's personal health information. A copy of the bill is available at http://www.leg.bc.ca/38th4th/1st_read/gov24-1.htm.

ABANDONED PATIENT RECORDS IN MOOSE JAW

The OIPC was forced to intervene for a second time to protect a large number of records containing personal health information that were found abandoned. In this case the patient records were located in Moose Jaw. In response to an anonymous complaint, staff from the OIPC attended to the Hammond Building at 310 Main Street North in Moose Jaw on April 2, 2008. In vacant office space the OIPC staff found six large boxes containing what appeared to be physician records on several hundred patients in the Moose Jaw region. The personal health information in the files included at least one completed sexual assault kit. These records were in an empty office without a lock on the door. Further investigation led to the discovery of more than 73 'banker boxes' of patient files in the basement to which a number of the building's occupants had ready access. These records appeared to relate to multiple physicians who practiced at one time or another in Moose Jaw. Physicians in Saskatchewan are health information trustees and have statutory duties to ensure that there are reasonable physical, technical and administrative safeguards in place for all personal health information in their custody or control. These statutory duties are reinforced by an offence provision in HIPA and a penalty provision of a maximum fine of $50,000 for an individual and $500,000 for an organization. More information is available at www.oipc.sk.ca under the *What's New* tab. We hope to complete this investigation soon.

[3] Custodian under Alberta's *Health Information Act* is the counterpart to a trustee under HIPA.

FUTURE EVENTS

May 4-7, 2008 - eHealth: Extending the Reach - Vancouver, British Columbia (visit www.e-healthconference.com for details)

May 6-7, 2008 – Manitoba Access and Privacy Conference 2008 - Winnipeg, Manitoba (visit www.verney.ca for details)

May 13, 2008 – CBA Privacy and Access Law Section Luncheon Meeting – Topic: Privacy Laws and Disclosures to Police - Hotel Saskatchewan, Regina and via telephone hook-up in Saskatoon (visit http://www.cba.org/saskatchewan/main/events/section.aspx for details)

May 21-23, 2008 – IAPP Canadian Privacy Summit – Toronto, Ontario (visit www.privacyassociation.org for details)

May 29-30, 2008 - Insight: Online Security Threats - Public and Private Sector Strategies - Vancouver, British Columbia (visit www.insightinfo.com for details)

June 18-20, 2008 – University of Alberta: Access and Privacy Conference 2008 – Edmonton, Alberta (visit http://www3.extension.ualberta.ca/accessandprivacy/)

October 22, 2008 – Manitoba Ombudsman and Information and Privacy Commissioners from Alberta and Saskatchewan -- Health Information Privacy Day 2008 – Winnipeg, Manitoba (visit http://www.ombudsman.mb.ca/access.htm)

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